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No. 193. October Term, 1902.

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Supreme Court of the United States.

The Atlantic and Pacific Telegraph Company,
Plaintiff in Error,

against

The City of Philadelphia, Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

H. B. GILL,
SILAS W. PETTIT,
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IN THE SUPREME COURT OF THE UNITED STATES.

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No. 163.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania. The question is, whether the city of Philadelphia can collect of the telegraph company the sums of one dollar per telegraph pole per annum, and of two dollars and fifty cents per mile of telegraph wire per annum, imposed by it as a license tax in the alleged exercise of its police power.

The defense was that the company is engaged in the business of interstate commerce; that its poles and wires are the necessary instrumentalities of that business; and that the said tax is illegal because a burden upon and regulation of interstate commerce and as such prohibited by the commerce clause of the Constitution of the United States.

The further defense of the defendant was that it had paid its taxes in full; had accepted the Act of Congress of July 24th, 1866, and that the ordinances imposing a tax on poles and on wires were revenue ordinances; that fees

and charges were unreasonable, and more than ten times the cost of regulating and supervising, and that the said ordinances were void and have no effect, because the city had no authority to pass the same, and also because the same were in conflict with the commerce clause of the Constitution. (Record, pages 15, 16.)

Upon the trial of the case the jury was instructed to find a verdict for the plaintiff for the full amount of its claim (Record, page 82) upon evidence substantially as follows:—

The city, as plaintiff, gave in evidence an ordinance of January 6th, 1881 (Record, page 26), entitled "An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the city of Philadelphia," as follows:—

> "WHEREAS, Great inconvenience and annoyance have been occasioned to property owners by the placing of telegraph poles in front of their premises;
>
> "AND WHEREAS, The lives and property of citizens traveling upon the public streets and highways have been imperiled by the erection and maintenance of inadequate or unsound telegraph poles thereon, so that it has become necessary to establish a system for the proper inspection of such poles, and for the regulation of the erection and maintenance thereof."

Therefore it was provided that whenever Councils should grant permission to any company to erect poles in the street, such company should apply to the Superintendent of Police and Fire Alarm Telegraph for a license to erect the same, and for which it should pay five dollars a pole; that it should be the duty of the Superintendent to "*cause a thorough and careful inspection to be made at least once in each year of all telegraph or telephone poles erected within the corporate limits of the city of Philadelphia,*" and notify the owners of any of those found dangerous; that such poles should be marked and numbered, and it should be the duty of the owner to take out a yearly

license for their maintenance, for which they should pay one dollar a pole.

The city offered in evidence another ordinance of March 30th, 1883 (Record, page 28), which is entitled, "An ordinance to regulate the introduction and use of underground conduits, wires, and cables for electrical conductors, *and to provide for charges for* underground, overground, or overhead wires, and to repeal an ordinance entitled," &c.

By this ordinance it was provided that all companies which theretofore had, or thereafter might have, permission to lay underground conduits for electrical conductors, and all companies to whom permission had been, or might be, given for the erection of poles, wires, &c., upon the streets, should conform to said ordinance. Sections 2, 3, 4, 5, 8, 10, and 11 apply solely to the regulation of underground conduits; section 6 provides that the owners of wires and electrical conductors, underground or upon poles, should make an annual return to the Superintendent of Police and Fire Alarm Telegraph of the number, location, and miles of such wire; and section 7 requires an annual payment of five dollars per mile per wire for electric lighting, and two dollars and fifty cents per mile per wire for telegraphic purposes, where such wires are suspended above ground; and two dollars and fifty cents per mile per wire for electric lighting, and one dollar per mile per wire for telegraphic purposes, where they are placed underground; section 12 is the usual repealing clause.

The city also offered in evidence an ordinance of August 5th, 1886 (Record, page 32), which is in effect a reenactment, with some alterations, of the regulations of the ordinance of March, 1883, in respect to laying, maintaining, and operating underground conduits for electrical conductors, except that the charges imposed upon electrical conductors placed under ground were thereby repealed. That is to say, that since August 5th, 1886, no annual charge is imposed on electrical conductors placed underground.

Having proved these ordinances and offered in evidence the defendant's return of the poles and wires maintained by it, the city rested its case.

The defendant proved that it had accepted the Act of Congress of July 24th, 1866, and called Mr. William B. Gill, its superintendent at Philadelphia, who testified to his knowledge of the poles and wires in question and described their location, and that—

> "They were used for the general business of the entire country, messages from all parts of the South, the North, the East, and West, all going to Washington or New York and New Orleans, or cablegrams or Government messages.
>
> "Q. During that time what regulation or supervision did the city of Philadelphia exercise over these poles and wires?
>
> "A. None. The supervision and regulation is looked after by the telegraph company itself. When we desire to take down a line of poles with wires on we get a permit from the Electrical Department; if we desire to renew a line of poles we get a permit from the Electrical Department, and then we get a permit for our line, which is given once a year." (Record, page 36.)

Upon cross examination the witness testified that the company had fourteen linemen constantly employed looking after and keeping in repair the poles and wires of the company.

> "Q. Do I understand you to say that the Electrical Bureau performs no supervision?
>
> "A. Except that that I have named in issuing the permit." (Record, page 46.)

Mr. Gill also testified that there were thirty-seven poles to the mile, and about twenty to twenty-five wires on the poles of the defendant company; thus showing that the license charge amounted to about three dollars and ninety-eight- cents ($3.98) per mile of wire; and that

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the average rate of actual cost for maintenance and keeping in repair (including therein of necessity the inspection, as well as the new poles, wires, cross arms, insulators, and other material used in and the labor of doing the work) of the poles and wires of the Western Union Telegraph Company for the seven years included in the suit was one dollar and sixty and three-sevenths cents ($1.60 3/7 per mile of wire, that is to say, the cost of maintenance, including inspection, repair and renewal, labor and materials, was less than one-half as much as the city's tax for its alleged regulation and inspection of said poles and wires. (Exhibit No. 1, Record, page 59.)

Defendant also showed that the amount of the license charges imposed by the city under the ordinances sued on for the years in question was from $16,281.27 to $18,349 per annum (Exhibit No. 2, Record, page 59), and that the total salaries and incidental expenses of the Electrical Bureau was from $8100 in 1885, to $24,630 in 1891, and it was also shown that the reason of this large increase in the expenses of the Bureau was because the lines of the city itself had increased from thirty-six hundred and eighty-six poles in 1885 to fifty-five hundred and thirty poles in 1891, and from five hundred and thirty-eight miles of wire in 1885 to eight hundred and thirty-seven miles of wire in 1891, and because of the construction and operation by the city of some two million feet (three hundred and seventy-eight miles) of underground conduits, part of which it rents to the companies.

For the seven years for which suit was brought the evidence showed that the whole expense of the Electrical Department was $111,910, including therein the salaries of the chief, his clerks, foreman, linemen, horse and wagons, &c., while the total of the license charges for the same years amounted to $118,864.77.

The reports of the Electrical Bureau were put in evidence to show that the Bureau had issued the following number of permits for poles and wires in the years men-

tioned, to wit: 1886, 250; 1887, 146; 1888, 161; 1889, 289; 1890, 336; 1891, 534. (Record, pages 49, 50, 79, 59, 60, 61.)

In rebuttal the city called Mr. Walker, its Chief of the Electrical Bureau (formerly called the Superintendent of Police and Fire-Alarm Telegraph), who testified, among other things, as follows:—

> "Q. Please mention just what the employees of the Electrical Bureau do with regard to wires belonging to other parties than the city of Philadelphia. I am now speaking of overhead wires.
>
> "A. We have a chief line inspector, who is constantly upon the street all over the city, looking after lines, to see that they are in order, and that everybody uses proper care so far as safety is concerned—poles and wires—and where he comes across any poles that have decayed or any that is liable to be pulled down, or in a dangerous condition in any way, he reports to me—to the head of the office—and from me it is communicated to the parties interested, telephone, telegraph, and electric light companies, to give the matter attention. When it is urgent, we give it immediate attention, or as soon as possible, to avoid accidents. Our other men do the same way, and they report—our linemen, what we call pole climbers. We have a great many complaints from citizens, of these housetop wires that have been placed upon their buildings without authority, some places, to go and cut them off. Others where they are cut and dangling over the fronts of buildings. We send out our linemen to remove those ends, or whatever may be hanging over the buildings, or dangerous, in the street. In other words, to keep the street clear of all dangerous wires." (Record, page 58.)

And on being recalled after adjournment, he continued:—

"The Bureau supervises the erection, construction, and maintenance of all poles and wires, of any kind of electrical work upon the highways; supervises the construction and maintenance and see that they are kept in proper position, and see that they are placed in the proper position, that is to say, with telegraph wires the rule of the Department is that telegraph wires shall be above the electric light wires where it is possible to have it so. The electric light wires are not permitted over the top of other wires if it can be avoided.

"Q. The object of that is what?

"A. Safety. To prevent accidents." (Record, page 62.)

Mr. Walker also testified in respect to the ordinances given in evidence:—

"By Counsel for the City:—

"Q. *What was the object of these changes*, imposing a charge on overhead wires, and the removal of charges from underground wires?

"A. *As an inducement for them to place their wires underground.* To remove them from this danger of overhead construction and the accumulation of dangerous wires." (Record, page 65.)

On cross examination he testified:—

"Q. In respect to the granting of permits to these telegraph companies, is there any man or boy about your place that you can dispense with if you do not have those permits to grant?

"A. No, sir; we are very much crippled for help as it is; our force is too small." (Record, page 68.)

The city also called Hon. A. M. Beitler, Judge of the Court of Common Pleas, who formerly was in the Law Department of the city, and also was Director of Public Safety for several years, and as such acquainted with the city's business, who testified as follows:—

"Q. Will you state to the court and jury what branch of the city government has the most intimate relations with the matter of poles and wires in the streets of the city?

"A. The department, of course, is the Department of Public Safety; but the bureau in that department that has the most to do with the subject is the Electrical Bureau; incidentally, and to an extent considerable, but not as great as the Electrical Bureau, the Police Bureau has to do with it, and from the standpoint of inconvenience, the Fire Bureau has to do with the subject. * * * The Electrical Bureau of the city of Philadelphia is unlike, I think, the Electrical Bureau of any other city. It comprises all the branches of electrical service, has charge of the telephone service of the city of Philadelphia, including the patrol-box system, and also of the fire-alarm system. It has, in addition to that, the entire charge of the erection, the renewal and the supervision of all the electrical construction, whether the city's or a company's, in locating wires, either underground or overhead." (Record, pages 51, 52.)

He further testified that the police were instructed to see that the electric lights (about nine thousand lamps at the time of trial) were kept burning regularly, and to report upon any structures on the highway that could result in harm, not only poles and wires, but trees, sign posts, &c., and produced a blank form of report which the patrolmen were required to fill up (Exhibit B, Record, page 80) in respect to pavements, curbs, gutters, roadways, posts, trees, and other structures on the highways out of repair or dangerous.

In respect to the Fire Department, he testified that the firemen were equipped with an apparatus to cut the wires if they obstructed them in dealing with a fire. (Record, pages 51-53.)

There was considerable testimony introduced to show

that accidents happen from contact with wires charged with electricity, and that persons have been injured and fires occasioned thereby, and was, in substance, to the effect that while the electricity with which a telegraph wire is charged is entirely harmless, yet that electric-light wires and trolley wires are so charged with electricity that the current is dangerous to persons coming into contact therewith, and is sometimes the occasion of fire, and that where electric-light or trolley wires come in contact with telegraph, or even telephone wires, they sometimes so charge the latter wires as to render them also dangerous, and that the liability to such accident was greatly reduced by placing the electrical conductors under ground. It clearly appeared that telegraph wires had not been dangerous prior to the introduction of wires for electric lighting and street car—purely urban—purposes, and even now were only dangerous when brought into accidental contact with such wires.

There was absolutely no evidence on the part of the city that the yearly inspection provided for by the ordinance of 1881 was ever made, nor of any definite expenditure by it in the supervision or regulation of telegraph wires, nor that any part of the time or services of policemen or firemen, or any other employee of the city, was given to the regulation or supervision of telegraph poles and wires: while in respect to the services of the employees of the Electrical Bureau, which alone had any particular concern with telegraph poles and wires, it was shown that what they had to do, or did, in respect thereto was incidental merely to their services in attending to the City's own telegraph and telephone poles and wires, and there was no allegation even that said employees were directly employed at any time in inspecting or regulating the wires of telegraph companies. It was shown by the defendant that the total of the license charges was about equal to the total salaries and office expenses of the department which had the construction, repair, and management of the city's lines of police and fire alarm, telegraph and telephone; and it was also shown that while

the average cost for the nine years in question of maintaining and keeping in repair the poles and wires of the company was only one dollar and sixty and three-seventh cents ($1.60 3/7) per mile of wire per annum, which charge necessarily included the inspection required to ascertain the need of repair or reconstruction, as well as the cost of the material used in and the doing the work, yet the license charge of the city for inspection and regulation merely, amounted to three dollars and ninety-eight cents ($3.98) per mile of wire per annum; or, in other words, more than twice as much.

The court instructed the jury to find a verdict in favor of the plaintiff for the full amount of its claim and from the judgment thereon this appeal has been taken to this court.

SPECIFICATIONS OF ERROR.

I. The court erred in overruling the objection made by the defendant to the following question asked by the plaintiff's counsel of the witness Hon. A. M. Beitler, to wit:—

> "Are you able to state whether the presence of wires overhead on telegraph poles a little distance inside the curb line is any substantial interference with the work of the fire service?"

II. The learned judge who tried the cause erred in not reducing the amount of the verdict by the charge for the year 1885 and interest thereon.

III. The learned court erred in entering judgment against the defendant for the amount of the charge for the year 1885.

IV. The learned court erred in including in the amount of the judgment the license charges for the year 1885.

V. The learned judge who tried the cause erred in charging the jury as follows:—

"We instruct you to render a verdict in favor of the plaintiff, the City, for the full amount of its claim."

VI. The learned judge who tried the cause erred in refusing the third point submitted by the defendant which third point was as follows:—

"The ordinances of the city of Philadelphia, approved January 6th, 1881, and March 30th, 1883, respectively, upon which this suit is brought, are regulations of commerce between the States so far as they are sought to be applied to the defendant, the Atlantic and Pacific Telegraph Company, and they are therefore void."

The answer of the learned judge thereto being as follows:—

"I decline to charge as above requested."

VII. The learned judge who tried the cause erred in refusing the fourth point submitted by the said defendant, which fourth point was as follows:—

"So far as the defendant, the Atlantic and Pacific Telegraph Company, is concerned, the city of Philadelphia has no power to enact the ordinances of January 6th, 1881, and March 30th, 1883, and your verdict should therefore be for the defendant."

The answer of the learned judge thereto being as follows:—

"I decline to charge as above requested."

VIII. The learned court erred in entering judgment in favor of the plaintiff for $7267.48.

(N. B.—It is not intended to argue the four assignments first stated.)

ARGUMENT.

I.

It is to be noted that this case differs from that of the Western Union Telegraph Company, plaintiff in error, against the Borough of New Hope (October Term, 1902, No. 101) argued before this court in December last and recently decided in this, that in that case the court left it to the jury to find whether the license fee exceeded what was reasonable under the circumstances, while in this case the court itself passed upon the question and gave a binding instruction to the jury to find for the plaintiff for the whole amount of both taxes—*i. e.*, the pole tax imposed by ordinance of 1881 and the wire tax imposed by ordinance of 1883.

The contention in this case is that the City of Philadelphia had no power to pass either of the ordinances or to impose either of the taxes in question, and that even if the City has the power to impose any charge as incident to a police regulation, the tax on the wires imposed by ordinance of 1883 was not imposed as part of such police regulation and is not justified under the police power; and that in respect to both ordinances, the evidence showed that the amount thereof was excessive, and therefore that the court below erred in instructing the jury to find for the plaintiff for the full amount sued for.

It is also to be noted that the case now under argument before this court differs from that of the City of Philadelphia against Western Union Telegraph Company in the Circuit Court of Appeals for the Third Circuit (reported 89 Fed. Rep., 454), in this, that the evidence in that cause differs materially from the evidence in the cause now before the court, as will be readily seen by comparison of the evidence as reported in 89 Fed. Rep., pages 454-460, with the evidence presented in this cause as shown by the record thereof.

In that case the Circuit Court of Appeals, per Mr. Jus-

tice Shiras, states the law to be that the charges in question were imposed under the police power and were valid, if reasonable in their amount and mode of collection, notwithstanding they were imposed upon a corporation engaged in interstate commerce, that the exaction of a license tax is a valid exercise of power by municipal corporations in order to cover expenses to which they may be put in the enforcement of their police rules and regulations, but that the legislative power to impose such taxes is not absolute, and the reasonableness of the exercise thereof can be judicially inquired into, and said that:—

> "The rule laid down in Cooley Const. Lim. (ed. 1886), page 242, may be safely adopted; 'a municipal corporation may impose under the police power such a charge for the license as will cover the necessary expenses of issuing it and the additional labor of officers and other expenses thereby incurred.' " (Page 461.)

We deny where (as in the case of telegraph companies which have accepted the Act of Congress of July 24th, 1866), Congress has regulated a subject of interstate commerce, that the States can further regulate the same subject and make a charge by way of a license fee or otherwise as a condition of the exercise of the right, or to reimburse the State the cost of such regulation; and if any charge is admissible, it is at most the absolutely necessary cost of executing inspection ordinances and regulations to see that they are kept in safe and proper condition.

In that case (89 Fed. Rep., *supra*) both sides conceded that under the evidence the reasonableness of the license fee was a question for the court to decide, and each requested a binding instruction in its favor, whereupon the court directed the jury to find for the defendant, and this judgment was reversed with direction to award a new trial upon the ground that certain evidence offered by the plaintiff had been excluded by the court, to wit,

"Evidence going to show that considerable additional expense in providing a greater number of fire companies and apparatus is rendered necessary by the electric wires extended in the street"; and also in "excluding the evidence offered of the expenses to which the City is, from time to time, put in connection with meeting of its councils for the purpose of regulating its wires and poles." (Page 462.) The Court also held that the case was one which should properly be decided by a jury.

Upon the trial of the case now under consideration no such evidence was offered—nor in fact could be.

And so also the evidence offered upon the last trial of this case, shown upon the record now before the Court, differs materially from the evidence offered upon the previous trial of this case, as can be readily inferred from the statement thereof, because upon that trial the jury having found in favor of the City for only about one-half of the claim, the judgment was reversed because of the refusal of the Court to affirm certain points appearing in the statement of the case as reported, which points could not be predicated upon the evidence produced at the last trial and printed in the record in this case.

Philadelphia *vs.* Atl. & Pac. Tel. Co., 102 Fed. Rep., 254.

In the present case the utmost that can be said of the evidence offered by the city is that it afforded ground for an inference that some part of the time of the employees of the Electrical Bureau was given to the issuing of the permits for and the inspection and regulation of the poles and wires of the telegraph companies, but it cannot be pretended that it in any way defined what part of the time of said employees was so occupied, or even tended to show what was the actual cost to the city for the service rendered; had the action been on a *quantum meruit* the plaintiff must certainly have been nonsuited. On the other hand, the defendant's evidence, besides being contradictory and explanatory of the city's statement of services rendered, showed that the charge made could

not be "reasonable," because it was twice as much as the cost of the maintenance and repair of the lines involved, that is to say, that the city charged twice as much for inspection and regulation as it cost the company to inspect, regulate, repair, and renew the said poles and wires, including therein the cost of the new material used, as well as the labor of placing it, and because the total of the charges made by the city to the telegraph companies was equal to the whole cost of the maintenance of the office of the Electrical Bureau, charged as it was with many other and important duties in respect to the city's own and much more extensive lines of telegraph poles and wires, its underground wires and its many thousand of electric lights—a Bureau of which one of the city's witnesses testified:—

> "The Electrical Bureau of the city of Philadelphia is unlike, I think, the electrical bureau of any other city. It comprises all the branches of electric serice, has charge of the telephone service of the city of Philadelphia, of the police system of the city of Philadelphia, including the patrol-box system and also of the fire-alarm system. It has, in addition to that, the entire charge of the erection, the renewal, and the supervision of all the electrical construction, whether the city's or a company's, in locating either underground or overhead." (Record, page 52.)

Of these duties the supervision and regulation of the poles and wires of telegraph companies appears from the evidence to have been a mere incident discharged by the City's employees by reporting any injury to or defect in these lines observed by them while attending to the City's property.

Upon the evidence the license tax of five dollars per pole for the permit to erect the same would have been ample to refund to the city all expenses which the evidence in this case showed, or tended to show, that it had incurred in this behalf.

The court therefore erred in holding that the ordinances were valid, and that the license fees or charges thereby imposed were valid, and in giving a peremptory instruction to the jury to find for the City the full amount of its claim, thereby depriving the defendant of the right to have the reasonableness of the license fee or charge or tax passed on by the jury.

II.

The only authority claimed by the city to impose the license tax in question is under and in aid of its police power.

The City of Philadelphia as laid out by Penn consisted of a strip of land about one mile in width, extending from the Delaware to the Schuylkill River, a distance of about two miles. At a very early date a number of the townships were incorporated as districts, having distinct municipal governments, until finally, by Act of February 2d, 1854 (P. L., 21), entitled "An Act to incorporate the City of Philadelphia," said City proper, together with all the outlying districts and townships within the County, were consolidated into one municipal corporation, called the City of Philadelphia, and coterminus with the limits of the County of Philadelphia. The powers of the City, as of the various districts, were conferred by many Acts of Assembly, and are too numerous to detail, but it is enough to say that no express power was given by any of such Acts to tax, regulate, or license telegraph poles and wires, and no implied power, except in so far as the Act of incorporation, by section 4, enacted:—

> "The legislative powers of the said City shall be vested in two bodies, to be called the Select and Common Councils, &c."

And by section 6 enacted:—

> "Upon the first organization of the Councils provided in the preceding section, the City of Phila-

delphia as established by this Act shall be vested with all the powers, rights, privileges, and immunities incident to a municipal corporation and necessary for the proper government of the same, and those of the present corporation of the Mayor, aldermen, and citizens of Philadelphia * * * and all the powers, rights, privileges, and immunities possessed and enjoyed by the following corporations, respectively, and all officers under them, to wit:"

Then follows the enumeration of the twenty-eight districts, boroughs, and townships theretofore included within the County of Philadelphia.

It will thus be seen, therefore, that the pretended power of the City of Philadelphia to impose the tax in question is derived solely from its possession of the "powers, rights, privileges, and immunities incident to a municipal corporation and necessary for the proper government of the same," and from no other source whatsoever. But this does not confer power to enact the ordinances in question.

Cooley on Taxation, page 597.

Numerous municipalities in the State of Pennsylvania have imposed these license charges upon telegraph poles and wires of the plaintiff in error and other telegraph companies, payment of which has always been resisted, and the validity of the same has therefore been frequently brought before the Supreme Court of that State; which court, however, has uniformly sustained said charges and enforced their collection.

If, therefore, the City has any power at all to impose a tax for the maintenance of telegraph poles and wires in its streets as part and in aid of a police regulation, which we deny, it is confidently asserted that in none of the cases cited has that court applied the rule, as defined by all the authorities, which limits the amount of police charges to the expenses of police regulation.

The City of Allentown imposed a license tax of one dol-

lar per annum per telegraph pole and brought suit against the Western Union Telegraph Company to recover same. The court charged, *inter alia*, that "*the expense of inspecting the poles during the years in question amounts to nothing, and at the furthest it involved only the attention of the police officers for one or two days, and that these officers served at the rate of forty dollars a month,*" but further added that the City had power to impose the tax and that if the jury found that the poles were maintained as alleged, then to find for the plaintiff.

Upon error the Supreme Court of Pennsylvania held that the only question was, Whether the license tax was reasonable; that the amount thereof rests with the Councils in the first instance, and that

> "We cannot say that this discretion has been abused in this instance or that the license fee is unreasonable."
>
> Allentown *vs.* West. Un. Tel. Co., 148 Pa., 117.

In a suit brought by the City of Chester to recover like charges the telegraph company filed an affidavit of defense, in which it averred that the sum claimed as a license tax was unjust and unreasonable in that the amount was at least five times "the usual, ordinary, or necessary expense" of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality of the City of Chester.

As to this the Court said:—

> "The difficulty is it does not go far enough. It refers only to the usual, ordinary, or necessary expenses of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe and properly maintained, and should a citizen be in-

jured in person or property by reason of the neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year to the particular purposes specified in the affidavit."

Chester City *vs.* Western Union Telegraph Co., 154 Pa., 464.

In a suit subsequently brought by the City of Philadelphia to recover pole and wire license taxes the telegraph company endeavored to meet this statement by the Supreme Court of the elements of justification for such charges by an affidavit of defense, wherein it averred that the charges imposed were more than ten times—

"not only the cost of regulating the poles and wires and isusing licenses therefor and of the ordinary and necessary expenses imposed upon the city of Philadelphia thereby, but also all extraordinary expenses of the said city of Philadelphia, or its municipal officers, or damages arising from liability imposed upon the city by the erection and maintenance of said poles and wires, and all other costs and damages, liability for damage, loss, injury, and expenses of every nature whatsoever."

The court below made absolute a rule for judgment for want of a sufficient affidavit of defense without opinion, and the opinion of the Supreme Court of Pennsylvania brushed aside the allegation of the affidavit in the following manner:—

"We find nothing in the record that would justify us in sustaining either of the assignments of error. There was no error in entering judgment against the

defendant company for want of a sufficient affidavit of defense."

Philadelphia *vs.* American Union Tel. Co., 167 Pa., 406.

Without going over the whole list of cases, of which the above are fair samples, it is enough to say that the remainder of them reach the same result in the same way as in those above cited, and that no real attempt has ever been made to affirmatively show that the so-called license fee in any of the cases was based upon, or could be supported by, evidence of the actual expense incurred by the municipality for the inspection or regulation of the poles and wires licensed, nor was there any evidence of any prospective expense or charge to the municipality by reason of the maintenance thereof.

It must be constantly borne in mind that the power to tax and the power to regulate are entirely distinct powers, and that, as will be hereinafter conclusively shown, the municipalities of Pennsylvania have no power to tax the poles and wires in question; whatever powers they may have over such poles and wires are powers of regulation only.

The authorities are numerous and uniform to the effect that any pecuniary charge levied under express power to license and regulate must be limited to the reimbursement of the expense incurred in the regulation; this is, indeed, iterated and reiterated in the Pennsylvania cases above cited or referred to.

When, therefore, examination of those cases shows that in no single instance has any attempt been in any way made to apply the rule so announced or to measure the charge in question in the particular case, by the expense incurred by the municipality in that instance, it is respectfully insisted that it devolves upon this Court to examine the case as though brought originally before it.

If it is said that in the cases cited and referred to the

Courts based their decisions not upon expenses incurred, but upon the possible liabilities of the future, it would seem that the answer is plain—that the expectation of the future must be ascertained from the experience of the past. It was competent for the Telegraph Company to call witnesses to prove what had been done in the past, and to show that no expense and liability had been incurred by the City, but it was quite impossible for it to call witnesses to prophesy what would happen in the future. This suit involved taxes for seven consecutive years, and if during all those years the City had in fact been put to no expense and had incurred no liability, as was testified to by the defendant's witness, the case should have been submitted to the jury with proper instructions, and the jury would have had the right to infer that there was no expense to be repaid and no liability to be guarded against.

In point of fact, upon the first trial of this case when it was submitted to the jury, the jury notwithstanding the well-known prejudice against corporations, found for the City, but for about one-half of its claim.

It is not intended to argue that the City may not supervise the location of the poles erected to sustain the telegraph wires of the plaintiff in error and require them to be properly painted and marked so as to be readily identified, and make such inspection of them and of the wires upon them as may be necessary to protect the public welfare, but it is intended to respectfully insist that the license fee imposed by the ordinances here in question is a tax upon, and regulation of, the interstate commerce carried on by means thereof, against which the plaintiff in error is entitled to claim the protection of this Court.

One of the Courts of Common Pleas of Pennsylvania has recently held in the case of the *Township of Lower Merion* vs. *Postal Tel. Co.*, December, 1902, that a *township* can impose and collect a pole and wire license tax, and as this seems to be in accord with the decisions of the Supreme Court of that State already cited, it is plain that

every telegraph pole and every telegraph wire throughout the State is subject to the same tax. And furthermore, it must be remembered that there is *no express legislative authority for the tax in question here*, but the right to impose the same is based entirely upon the general police powers of the municipality, and inasmuch as those general police powers are substantially the same in all parts of the United States, it follows that the same tax can be imposed by all other municipalities throughout the country, and it is therefore evident that telegraph companies will hereafter be subjected to a burden, the weight of which is fixed only by the caprice of the township, borough, and city authorities, and which in the aggregate will exceed all their taxes properly so called, that is to say, all the taxes which can be or are levied upon their property at a fair and just valuation and a rate of taxation which bears equally upon other property.

It is obvious that if the rule adopted in Pennsylvania, and put in practice by a constantly increasing number of her municipalities, is extended throughout that State, and other States, the aggregate of the pole and wire tax thus imposed on telegraph companies will be enormous, indeed, it is confidently asserted that in that case it would exceed all other taxation to which they are now subject, and exceed all their net revenue.

Even as the matter now stands, the total amount of these taxes has assumed very grave proportions and is yearly increasing, and inasmuch as the Courts of Pennsylvania have imposed no restrictions upon the amount that the municipalities may thus impose, and have refused to hold them bound by the restrictions established by the authorities in respect to such license charges upon other kinds of property or occupations, it leaves the Telegraph Company helpless, except in so far as the Federal Courts will protect its interstate business by establishing some rule to which the municipalities must conform.

That rule must be that if such charges are permissible at all, they must be limited as in cases of State inspection laws to such charges "as may be absolutely necessary to execute such laws." Constitution of the United States,

article 1., section 10. The ordinances here in question conflict with such rule and are void.

III.

That the charge sued for is imposed under and sought to be justified as an exercise of the police power of the municipality, is so clearly stated in the opinion of the United States Circuit Court of Appeals, already cited, and in the opinions of the Supreme Court of Pennsylvania above quoted or referred to, as perhaps to need no further comment, but in view of the importance of this case to the plaintiff in error, it may be well to point out that the charges sued for here can be sustained, if at all (which we deny), only as police regulation in fact as well as in form—that the City is without power to impose them otherwise.

It cannot be in any way sustained as a property tax, because—

(*a.*)

It is clearly shown by the record that there has been no assessment of the property taxed which is a necessary preliminary to valid taxation.

The defense pleaded showed that the company had paid all taxes upon its capital or property required by the laws of the State. (Record, page 15.)

(*b.*)

Under the law of Pennsylvania the property of the Telegraph Company necessary to the exercise of its franchises is not taxable by the municipality. The principle which is recognized in all the cases in Pennsylvania is that the public works of a corporation used as such, with their necessary appurtenances, which are essential to the carrying out of the public purposes of such corporations and the value of which is included in the capital stock which is taxed by the State, is not taxable by the municipality, for the reason that the State has never authorized such

taxation by the municipalities; but, on the contrary, has reserved this to itself. In point of fact, the State of Pennsylvania derives more than one-half of its revenues from taxes on the capital stock, gross receipts, and bonded debt of corporations, and pays back to the counties more than one-third of its revenues so derived.

Lehigh Company *vs.* Northampton County, 8 Watts & Sergt., 334;

Railroad *vs.* Berks County, 6 Pa. St. Rep., 70;

Schuylkill Nav. Company *vs.* Berks Co., 11 Pa. St. Rep., 202;

New York *vs.* Erie Ry. Co. *vs.* Sabine, 26 Pa. St., 242;

West Chseter Gas Co. *vs.* Chester County, 30 Pa. St., 232;

Light & Heat Co. *vs.* Elk County, 191 Pa. St., 465.

(*c.*)

Nor can the charge in question be sustained as a rental or compensation to be paid by the Telegraph Company to the municipality for the privilege of occupying its streets, and the decisions of this court in the cases of the City of St Louis against the Western Union Telegraph Company do not apply to or in anywise sustain the claim of the City of Philadelphia in this case.

As these cases are likely to be referred to it may be well to consider them fully.

The City of St. Louis passed an ordinance, viz.:—

> "From and after the first day of July, 1884, all telegraph and telephone companies which are not by ordinance taxed on their gross income for city purposes, *shall pay to the City of St. Louis for the privilege of using the streets*, alleys, and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys, and public places in said city."

The Western Union Telegraph Company having declined to pay this charge suit was brought therefor, which was tried in the Circuit Court of the United States at St. Louis without a jury, and the Court there held, that—

> "The object of the enactment was evidently to secure revenue for the municipality; hence the burden imposed is a tax, *and it is imposed in such form that it can only be regarded as a privilege or license tax* which the City has no authority to impose. Judgment will be entered for defendant."
>
> St. Louis *vs.* Western Union Tel. Co., 39 Fed. Rep., 59.

Upon error this Court held:—

> "And first with reference to the ruling that this charge was a privilege or license tax. To determine this question we must refer to the language of the ordinance itself, and by that we find that the charge is *imposed for the privilege of using* the streets, alleys, and public places, and is graduated by the amount of such use. *Clearly, this is no privilege or license tax.* The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the City—*that which may properly be called rental.* * * * Whether the City has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation or upon its business or for the privilege of doing business is thus disclosed by the very terms of the section. *The City has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the City. It is seeking to collect rent.*"
>
> St. Louis *vs.* Western Union Tel. Co., 148 U. S., 92, 97-98.

But this Court also added:—

> "Indeed, it may be observed, in the line of the thoughts heretofore expressed, *that this charge is one in the nature of rental; that the occupation by this Interstate Commerce Company of the streets cannot be denied by the City;* that all it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is a reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city."
>
> St. Louis *vs.* Westn. Un. Tel. Co., 148 U. S., 92-105.

A petition for a rehearing of this case was filed upon the ground that the City of St. Louis had no such interest in and control over the streets as authorized it to impose a charge in the nature of rental for the exclusive use of portions thereof.

This Court filed an opinion denying said petition, and therein said:—

> "Control over the streets resides somewhere. As the legislative power of a State is vested in the legislature, generally that body has a supreme control, and it delegates to municipal corporations such measure thereof as it deems best. The City of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter, under express authority from the people of the State given in the Constitution, * * * and this charter is an organic Act, so defined in the Constitution, and it is to be construed as organic Acts are construed. The City is in a very just sense an '*imperium in imperio.*' Its

powers are self appointed, and the reserved control existing in the General Assembly does not take away this peculiar feature of its charter."

City of St. Louis *vs.* Western Union Tel. Co., 149 U. S., 465-467.

The case was retried by the Circuit Court without a jury, and it was again found that even as rental the sum charged was excessive and judgment was given for the defendant.

St. Louis *vs.* Western Union Tel. Co., 63 Fed. Rep., 68.

An appeal was taken by the City to this judgment, but the judgment was finally confirmed by consent.

But the City of Philadelphia has no such power as has the City of St. Louis. The Constitution of Pennsylvania, article XVI., section 12, provides:—

"Any association or corporation, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and the General Assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section."

Pursuant to this mandate the Legislature of Pennsylvania, by Act of 29th April, 1874, section 33, P. L., 92, provided for the incorporation of telegraph companies, and that when incorporated they should be authorized—

"To construct lines of telegraph along and upon any of the public roads, streets, lands, or highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the cords or wires of such lines; but the same shall not be so constructed as to incommode the public use of said roads, streets, or highways, or injuriously interrupt the navigation of said waters."

This not only does not confer upon the City the right to exact a license fee for the use of the streets, but it excludes the right to require such a fee or to pass the ordinances here in question.

It will thus be seen that the construction and maintenance of telegraph lines within the State of Pennsylvania, including the cities thereof, are directly authorized by the Constitution of that State, and that the power given to the Legislature in respect thereto is that of "reasonable regulation" only. Clearly, the powers of the City of Philadelphia are likewise restricted in the same way.

That this legislative authority is all that is needed, and that the municipalities cannot restrict or interfere with the same is plain. The line of decisions in Pennsylvania is uniform that the Commonwealth owns the franchise of every highway, and that no municipal corporation has any power over them except in so far as it is delegated to it by the State.

> "To the Commonwealth here as to the King in England belongs the franchise of every highway as a trustee for the public, and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, canals, or public roads laid out by the authority of the Quarter Sessions. In England a public road is called the 'king's highway,' and though it is not usually called the 'Commonwealth's highway' here, it is so in contemplation of law, for it exists only by force of the Commonwealth's authority."

O'Connor *vs.* Pittsburgh, 18 Pa. St., 187-189.

> "The power of the legislature to establish a turnpike gate in the streets or public ways of a city is hardly to be questioned; it is a part of the eminent domain which belongs to the sovereign authority. It is conceded to the General Assembly by the grant

of all legislative power, and is not restrained by the Bill of Rights. There is nothing in the street of a city or town to make it greater or more distinguished than a highway in the rural districts except convenience and the density of population, and these restrain not the power of legislation. The power of making and repairing roads and removing nuisances is granted by law to supervisors of highways under the direction of the Courts, and they are bound to do it; yet this does not prevent the legislature from authorizing turnpikes and the erection of gates on these roads. Neither does the obligation of cities to open and repair streets interpose any barrier against the right of the sovereign power to regulate its highways, and streets in a town or city are nothing more."

Stormfelt *vs.* Manor Turnpike Co., 13 Pa. St., 555-559.

"In the present case the right to lay the track upon any public road then opened or thereafter to be opened is expressly given without any qualification, and hence the consent of the Borough of Millvale to the construction and operation of the road over its streets need not be obtained and is a matter of indifference. * * * This being so, it will be seen at once that the Borough has no control over the construction or operation of the road within its limits. *The power of the defendant in the exercise of its franchise is altogether independent of the Borough, and is of just as high and authoritative origin as the right of the Borough to exist at all.* The rights of both are derived from the same source, to wit, the legislative power of the Commonwealth, and the company is not subject to the slightest obligation to go to the Borough for consent to exercise any part of its corporate franchise. Any other doctrine would subordinate the corporate franchise of the defendant to

the will of the Borough Councils, and cannot be sanctioned for a moment."

Millvale Bor. *vs.* Evergreen Ry. Co., 131 Pa. St., 1-23-24.

"The right of the Supreme legislative power to authorize the building of a railroad on a street or other public highway is not to be doubted. * * * If such conversion of a public street to purposes for which it was not originally designated does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood."

Commonwealth *vs.* R. R. Co., 27 Pa. St., 339-354.

The rule in Pennsylvania in this regard is indeed so thoroughly settled that it is not necessary to multiply citations. Other and equally strong expressions will be found in—

Case of Philadelphia & Trenton R. R. Co., 6 Wharton, 25;
Commissioners *vs.* Gas Co., 12 Pa. St., 318;
Mercer *vs.* Pittsburgh, &c., Ry. Co., 36 Pa. St., 99;
Danville, &c., R. R. Co. *vs.* Commonwealth, 73 Pa. St., 29;
City of Pittsburgh's App., 115 Pa. St., 4;
Williamsport Pass. Ry. Co.'s App., 120 Pa. St., 1;
Homestead Street Ry. *vs.* Pittsburgh, &c., Ry. Co., 166 Pa. St., 162.

The result of these authorities is thus summarized by a text writer of authority:—

"By virtue of its authority over public ways, the legislature may authorize acts to be done upon them,

or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies to use or occupy streets and highways for their respective purposes. And it may be here observed that whatever the legislature may authorize to be done is, of course, lawful, and of such acts, done pursuant to the authority given, it cannot be predicated that they are nuisances. If they were such without, they cease to be nuisances when they have the sanction of a valid statute. As respects the public or municipalities, there is no limit upon the power of the legislature as to the uses to which streets may be devoted."

2 Dillon Mun. Corp., section 657 (3d ed.).

It is perfectly clear, therefore, that in Pennsylvania there is no power in a municipality to impose any charge upon telegraph companies by way of rental for the use of its streets, because they are expressly authorized by the Constitution and laws of that State to occupy the highways with their poles and wires, and it is the State and not the municipality which has exclusive jurisdiction and control over the streets of the City, as of all other highways.

It will, therefore, be seen that in the St. Louis cases when the Court below held that the charge imposed was a license tax and unreasonable, and therefore void, the judgment was reversed by this Court upon the ground that the charge was *not* a license tax at all, but was a *rent* for the use of the space occupied by the poles in the highways, which, under the Constitution of Missouri, peculiar in that respect, the City of St. Louis had a right to impose, but that, inasmuch as "*the occupation by this interstate commerce company of the streets cannot be denied by the city,*" it was for the trial Court to determine whether the rental charged was reasonable; and it furthermore appears that upon a retrial of the case in conformity with the instruction given by this Court, the Court below again

decided that, as a rental, the charge was unreasonable, and this judgment, although at first appealed from, was finally acquiesced in by the City.

The City of Philadelphia, however, has no power to impose any charge by way of rental; and if this Court will control the City of St. Louis in the exercise of its right as land owner to charge rent to this plaintiff in error, *a fortiori*, it will control the City of Philadelphia in imposing upon it a license charge for the privilege of maintaining the poles and wires necessary to conduct its business of interstate commerce—in the "nature of postal service"—under the guise of a police regulation.

IV.

Nor can the plaintiff in error be held to pay the charge imposed in this case for the purpose of providing an insurance or guarantee fund to insure the municipality from damages for which it may be held liable by reason of the construction and maintenance of telegraph poles and wires.

This seems, however, to be the controlling thought in the decisions of the Supreme Court of Pennsylvania, which hold that the usual, ordinary, or necessary, expense of issuing licenses, &c., makes no provision for the liability imposed upon the City by the erection of telegraph poles, and that as it is the duty of the City to see that the poles are safe and properly maintained—

> "Should a citizen be injured *by reason of the neglect of such duty*, an action might lie against the city for the consequences of such neglect."
>
> Chester City *vs.* Western Union Tel. Co., 154 Pa., 464 (*supra*);
>
> Phila. *vs.* American Union Tel. Co., 167 Pa., 406 (*supra*).

It will no doubt be urged, in justification of the reasonableness of the charge imposed in this case, that in the event of injury to person or property from the improper construction or maintenance of a telegraph pole

or wire, the municipality would be liable therefor, and that it therefore has the right to protect itself therefrom by imposing such license charges upon the plaintiff in error as will provide a fund for the payment of such possible damages.

Inasmuch, however, as the municipality cannot exclude the Telegraph Company from occupying its highways with their poles and wires, as declared by this Court in Telegraph Co. *vs.* Telegraph Co., 96 U. S., 1, and again in St. Louis *vs.* The Western Union Tel. Co., 148 U. S., 92-98, *supra*, and as is expressly permitted by the Constitution of Pennsylvania, it is plain that such municipality cannot be in any way held liable merely because such poles and wires are constructed and maintained upon its highways. It therefore follows that any liability which may be imposed upon the municipality by reason thereof, can of necessity arise only from the neglect of the municipality itself to properly exercise its police power to inspect, regulate, and supervise the construction and maintenance of such poles and wires. Indeed, this is expressly so stated by the Supreme Court of Pennsylvania in Chester *vs.* West. Un. Tel. Co., just cited.

But it is respectfully insisted that it cannot be that a municipality has the right to impose upon a Telegraph Company the cost to the City of its supervision and regulation of the property of that Telegraph Company, and at the same time and in addition thereto collect from it other sums of money to reimburse it for damages to which it may be subjected by reason of the insufficiency of the regulation and supervision which it has undertaken, or the negligence with which it has performed the duty it has assumed in that behalf, and the cost of which it has already imposed upon and collected from the Telegraph Company. In other words, the Telegraph Company cannot be made to insure the municipality against liability for its own negligence.

And furthermore, in case of injury to person or property by negligence in the construction and maintenance of telegraph poles and wires, the Telegraph Company would

itself be primarily liable to the party injured, and certainly cannot call upon a municipality to repay to it any damages which it might be held to pay in such case, although it had, through the payment of license charges, provided a fund for such purpose. Nor will the telegraph company, after having itself paid the damages, be entitled to ask the return to it of the moneys which it had already paid to the municipality as its insurance against liability for such injury. And again, is it not clear that, in case of injury to person or property by the negligent construction or maintenance of telegraph poles and wires for which the municipality is held liable, such municipality can maintain its action therefor against the Telegraph Company?

If, therefore, the Telegraph Company is itself liable to any person injured by reason of the negligent construction and maintenance of its poles and wires, and is liable over again to the municipality if the municipality is held liable for such negligent construction and maintenance, and if the payment of the license charge in question does not operate to exonerate the Telegraph Company from such liability, it would seem to follow that the municipality cannot sustain the charge upon that ground, and especially that it cannot do so where its liability, that is to say, the liability of the municipality, clearly cannot arise except by reason of its own negligence in the exercise of its police power of regulation and supervision.

During the seven years sued for in this case the total of these pole and wire taxes amounted to $118,864.77 (Record, page 59); and yet no evidence was offered or attempt made to show that during all those years the City had ever been put to any expense whatever by reason of any injury caused by such poles and wires. If any such expense had been incurred, the knowledge and the evidence of it was with the City, and the failure to prove, or, indeed, even to aver, that any such had been incurred, affords the presumption that none such were incurred. The law draws its inferences from experience and not from imagination, and when for seven years no liability has

accrued it would seem to be necessarily inferred that no danger of liability exists.

"To what extent the police power of a State may be exerted on traffic and intercourse with the State without conflicting with the commerce clause of the Constitution of the United States, has not been precisely defined. In the case of Henderson *vs.* Mayor of New York, 92 U. S., 259, it was held that the statute of the State, which, aiming to secure indemnity against persons coming from foreign countries becoming a charge upon the State, required ship owners to pay a fixed sum for each passenger—that is, to pay for all passengers—not limiting the payment to those who might actually become such charge was void. Whether the statute would have been valid if so limited was not decided."

Per McKenna, J., Smith *vs.* St. Louis & S. W. Ry. Co., 181 U. S., 248-253.

"The City cannot collect and lay by a sum to insure itself against imaginary future demands which may possibly arise. If it properly discharges its duty of control and supervision no such demands can arise. It is responsible alone for vigilance and care in these respects. It may, possibly, at some time be subjected to expenditure in resisting such claims. This, judged by the past, is not probable. A very trifling annual surplus would provide for it. But, as the contingency is remote, such provision may well be left until it occurs."

Philadelphia *vs.* West. Un. Tel. Co., 40 Fed. Rep., 616.

V.

If, however, the City has, under its police power, not only the power to regulate the construction and maintenance of the poles and wires of interstate telegraph companies which have accepted the Act of Congress of July

24th, 1866, but has also the power to impose a charge upon said companies on their poles and wires under said police power (which we deny), still it is well settled that under such police power the City can only impose a license tax within certain well-defined limits, to wit, the necessary inspection expenses incurred by it in such lawful regulation and inspection of the telegraph poles and wires.

As already noted, it must be constantly remembered that the power to tax and the power to regulate are entirely distinct powers. It is true that both may be vested in the States as an attribute of their sovereignty, but most distinctly and emphatically it is not true that both are vested in municipalities—municipalities have no power to tax except as expressly conferred by the State, and that the City of Philadelphia has no power to tax the poles and wires of the plaintiff in error has already been most conclusively shown in another part of this brief.

Conceding, for the purposes of this part of the argument, that a municipal corporation has the power of police regulation, and that as part thereof it may impose a charge to reimburse itself the expense of such regulation, the concession must be accepted as limited: so far as the authorities concede such power to impose a charge at all, they all concur in restricting the power within the limits above stated, to wit, the reimbursement of the municipality of the expense of the regulation. Thus far some of the cases go—none of them go any further.

This restriction is, indeed, self-evident, because inasmuch as the power to tax and the power to regulate are different powers, it must necessarily follow that a charge imposed under the police power, or as part of a police regulation, must be limited to the necessity of its exercise; otherwise it ceases to become a regulation and does become a tax.

Consequently, the rule limiting the amount of a charge imposed under and in aid of the police power is well established to be the amount of the cost of such supervision and regulation and the cost of issuing the license, and under the power to license, express or implied, it is

clear that no right exists to impose a larger charge than will reimburse to the municipality the expense of regulation.

> "A right to license an employment does not imply a right to charge a license fee therefor with a view to revenue, unless such seems to be the manifest purpose of the power; but the authority of the corporation will be limited to such a charge for the license as will cover the necessary expenses of issuing it and the additional labor of officers and other expenses thereby imposed. A license is issued under the police power, but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation, and the charter must plainly show an intent to confer that power, or the municipal corporation cannot assume it."
>
> Cooley on Const. Lim., page 242 (6th ed.).

But this principle is not applicable to interstate commerce, especially when actually regulated by Congress and license fees cannot be imposed.

> "The terms in which a municipality is empowered to grant licenses will be expected to indicate with sufficient precision whether the grant is conferred for the purposes of revenue, or whether, on the other hand, it is given for regulation merely. * * * Where the grant is not made for revenue, but for regulation merely, a much narrower construction is to be applied. A fee for the license may still be exacted (that is, if the power to license has been expressly granted to the City, which is not the case here), but it must be such a fee only as will legitimately assist in the regulation, and it should not exceed the necessary or probable expense of issuing the license and inspecting and regulating the business which it covers."
>
> Cooley on Taxation, pages 597, 598 (2d ed.).

> "The power to license and regulate particular branches of business or matters is usually a police power, but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes."
>
> Dillon on Mun. Corp., section 768 (3d ed.).

The charter of the city of Portland authorized it "*to control and regulate slaughter houses, wash houses, and public laundries and provide for their exclusion from the city limits or from any part thereof,*" and under that authority the city council passed an ordinance "*to license and regulate wash houses and public laundries,*" providing, *inter alia*, for "*a quarterly license of five dollars*" thereon.

Payment of this charge was resisted upon the ground that a fee of five dollars a quarter for a license to keep a wash house was manifestly a mere pretense for imposing an onerous tax on the business.

After citing and commenting upon numerous authorities, the court said:—

> "It follows that if the sum required of the petitioner by this ordinace is intended for revenue, and not merely regulation, the same is so far void. A fee may be required for a license merely as a means of regulation, but the amount must not be more than is necessary to cover the cost of issuing the license and for the incidental expenses attending the regulation of the business."
>
> Laundry License Case, 22 Fed. Rep., 701.

But the regulation must be one compatible with the commerce clause and the legislation of Congress.

The distinction between a license tax based upon the cost of regulation and a tax which, although called a license tax, and although imposed on a proper subject for a license tax, is, nevertheless, fixed upon the basis of some remuneration to the city, is very clearly pointed out in a case where the charter gave the Councils of Hoboken

power "to regulate the building of vaults and laying of water and gas pipes in and under the streets, and to secure to the public the safe and convenient use of the streets," and an ordinance provided that persons desiring to build vaults under the streets must first get authority of Councils, and must *pay a certain sum per square foot of space* occupied by said vault; plaintiff got a permit to dig a vault and was assessed under the ordinance. The court held much of the ordinance to be valid, but said:—

> "The exaction in question, graduated by the capacity of the vault, is in no sense a regulation such as is contemplated by the provisions of the charter. It is a tax or assessment upon the owner or occupier of lands for permission to improve the same for their more convenient use.
>
> "In the classification of corporate powers, the distinction between the power of taxation and the usual police powers, which are granted for the maintenance of peace and good order in the city, and the administration of its internal affairs, is well settled. The functions of the latter are not primarily the raising of revenue.
>
> "Incidentally, the public treasury may be benefited, as by the imposition of fines or penalties for the violation of city ordinance, by license fees when the power is specifically to license and exact license fees; or under the power to regulate markets by the exaction of market fees for the use of the corporate property. But in all such cases the court must see that the penalty or the requirement of fees for the exercise of privileges is a reasonable exercise of the power of legislation granted to the corporation. * * * The license fee here is not authorized as a mode of taxation; is not a reasonable exercise of the power of regulating the police of the city, and hence is void."
>
> State *vs.* Hoboken, 4 Vroom, 280-282.

Where the city of Hoboken by ordinance imposed a license tax on passenger railway cars, it was held:—

> "Under the power simply to regulate an ordinance cannot be passed to tax for revenue purposes. In the course of the administration of such a power the public treasury may be incidentally benefited by the imposition of fines and penalties, but in all such cases the amounts imposed must be such as are reasonably necessary to accomplish the regulation."
>
> North Hudson Ry. Co. *vs.* Hoboken, 41 N. J. L. (12 Vroom), 71.

The city of Saginaw passed an ordinance providing for the inspection and regulation of poles for the support of electric light wires and as incidental thereto imposed a license charge of fifty cents a pole a year, but the Supreme Court of Michigan distinctly admitting that the provision for regulation and inspection was a proper exercise of the police power of the city and expressly authorized by the laws of the State, yet adverting to the fact that the light company paid the taxes upon its property imposed by the laws of the State held that the police tax must be restricted to the cost of the police regulation, and as it deduced from the evidence that the cost of the regulation did not exceed one-tenth of the amount of the tax, reversed the court below and held the ordinance void so far as it imposed the tax aforesaid.

Saginaw *vs.* Swift Electric Light Co., 113 Mich., 660.

That under the guise of the power to regulate, a city cannot exercise the power to tax, is too well settled to require the citation at length of further authorities. It is sufficient to refer to

New York *vs.* 2d Ave. R. R., 32 N. Y., 261;
Cincinnati *vs.* Bryson, 15 Ohio, 625;
Mays *vs.* Cincinnati, 1 Ohio St., 268;
Dunham *vs.* Rochester, 5 Cowen, 462.

"Therefore, the power to tax (using the word in its strict and proper sense, as a means of raising municipal revenue) cannot be inferred from the general welfare clause in a charter. * * * *Nor is it included in the police power.*"

Jackson *vs.* Newman, 59 Miss., 385. Dillon's Municipal Corporations, section 764.

"A municipal corporation as such has no inherent power to grant licenses or exact license fees; it must derive all its authority in this regard from the State, and the power must come by direct grant and cannot be taken by implication."

Cooley on Taxation, 597 (2d ed.).

"A *license* is a right granted by some competent authority to do an act which, without such authority, would be illegal. A *tax* is a rate or sum of money assessed upon the person, property, &c., of the citizen."

Cooley on Taxation, 573 (2d ed.).

"The word 'license' means permission or authority; and a license to do a particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize."

Per Chief Justice MARSHALL, in Gibbons *vs.* Ogden, 9 Wheat., page 213.

VI.

It seems to be plain upon the evidence that the tax imposed by the City in this case exceeds the limits thus prescribed by the authorities.

The charge imposed is one dollar per telegraph pole per annum and two dollars and fifty cents per mile of telegraph wire per annum, which, counting thirty-seven poles to the mile and twenty-five wires on the poles (Record,

page 48) amounts to a tax of three dollars and ninety-eight cents ($3.98) per mile of wire. The City produced no evidence showing or tending to show any expenditure by it incident to the issuing of the license and the expense of the inspection, regulation, and police surveillance exercised by it over the poles and wires of the company, and rested its case entirely upon the presumption of the reasonableness of the charge made, said to arise from the fact that the municipality had imposed it.

The telegraph company then produced evidence tending to show that the City exercised no supervision whatever over its poles and wires, and that except the issuing of license therefor it did nothing whatever in respect thereto.

Under such circumstances it was manifestly impossible for the telegraph company to show exactly what amount of expense the City incurred in respect to the supervision and regulation of telegraph poles and wires, and the City itself was apparently unable to do so, but the telegraph company did show that the average cost for a period of years of maintenance and keeping in repair the poles and wires of the Western Union Telegraph Company, of which the line in question here is part, including therein of necessity the cost of the inspection thereof as well as the cost of the new poles, wires, cross arms, insulators, and other material used in and of the labor employed in doing the work was only one dollar and sixty and three-sevenths cents ($1.60 3/7) per mile of wire per annum, while the city's charge for inspection alone amounts to three dollars and ninety-eight cents ($3.98) per mile of wire per annum—or more than twice as much—which evidence and comparison, Dallas, Circuit Judge, in a similar case considered "very striking and cogent." (82 Federal Rep., 797.)

The telegraph company further showed the very trifling nature of the alleged service performed by further showing that the whole number of permits issued during the years in question was quite inconsiderable, varying from two hundred and fifty in 1886 up to five hundred and

thirty-four in 1891, and further proved by the head of the Department, that no man or boy about the Electrical Bureau of the City could have been dispensed with had it been relieved of the duty of issuing such permits, and it was also conclusively proved that the license charges imposed under the ordinances in question were for the seven years covered by this suit some $7000 more than the total expenses of the Electrical Bureau for the salary of its Chief and all his assistants, clerks, foreman, and linemen and horse and wagon.

For the year 1885 the total charges were $16,942.50, while the whole expense of the Bureau for salaries of the chief and his assistants, clerks, foreman, and lineman was only $8100, or less than half as much as the license charges, and although the expenses of the Bureau increased from year to year, until in 1891 they were $24,630, yet this increase was fully accounted for by the large and rapid growth of the City's own poles, wires, and underground conduits, of which latter the Bureau built some two million feet, say three hundred and seventy-eight miles, not only for the use of the City, but also for rental by it to the companies.

No evidence was offered to show that the City incurred any expense in its police department in respect to the poles and wires. It is true that some mention was made of the "work" of said department in relation thereto, but upon examination it will be seen that it amounts to nothing more than that a blank form was required to be filled up by each police officer specifying, among the other things, that he should report—

> "leaning telegraph poles, detached, broken or sagging wires"

observed by him upon his beat, along with signs, awning posts, fallen trees, broken manhole covers, &c.

But there was no allegation whatever that a single police officer could have been dispensed with had this duty not been imposed upon the force. Nor was there even any evidence that at any time any police officer had

found or reported a "leaning telegraph pole or a detached, broken, or sagging wire."

In respect to the Fire Department, there was some testimony that telegraph poles and wires occasionally inconvenienced the firemen in dealing with fires, but there was no allegation, much less evidence, that any extra expense had been incurred by reason of their presence, or that the employment of any larger number of men or apparatus was rendered necessary thereby. The City's main witness only mentioned this department as having anything to do with the subject as "*from the standpoint of inconvenience*" (Record, page 51), from which standpoint, however, no right to levy a tax can be discerned. It is conceded that the poles and wires are lawful and indeed necessary structures, and therefore no tax can be imposed upon them upon the ground that they are nuisances.

Briefly, then, although it might be inferred from the evidence that the City had been put to some expense in a proper supervision and regulation of the company's poles and wires within her limits, by the employees of the Electrical Bureau, yet there was no evidence whatever of any specific item of such expense, and it was plain that whatever service in this behalf was imposed upon the Electrical Bureau was but a very inconsiderable portion of the total services rendered by that bureau.

In the absence of evidence of any specific item of expense, it is respectfully insisted that the presumption of reasonableness arising from the passage of the ordinance was conclusively rebutted by the affirmative and uncontradicted evidence on the part of the defendant that the charges imposed amounted to more than twice the cost of maintenance, renewal, and repair of the poles and wires charged for, which necessarily included the inspection and regulation thereof, and that the total charges imposed were more than equivalent to the whole office expense of the department for the years for which the license tax was sued for, while that department was charged with many other onerous and responsible duties, with reference to the City's own property; and that the

uncontradicted evidence also shows that the amounts charged in this case under the guise of a police regulation far exceed, and were indeed many times the multiple of, any expense which the City could have incurred in connection with the inspection, regulation, and supervision of the poles and wires.

Furthermore, while the title of the ordinance of 1881 (Record, page 26) imports a police regulation, the title of the ordinance of 1883 (Record, page 28) does not so import, but, so far as concerns overground wires, professes to be for the purpose "*to provide for charges for underground, overground, or overhead wires,*" and examination of the ordinance shows no provision whatever for the regulation or inspection of such overground or overhead wires, and that the only provision therein relating thereto is the imposition of the tax of two dollars and fifty cents per mile per annum.

The purpose of this last-mentioned ordinance was proved by the head of the department, upon examination by the counsel for the City, to have been "*as an inducement to them* (the telegraph companies) *to place their wires under ground*" (Record, page 65), thus confirming the inference, irresistibly to be drawn from the testimony, that the charge imposed was intended to be for a purpose other than the mere reimbursement of the City for its expenses in this behalf incurred.

Such a tax finds no justification even in the police power, because there is no regulation or supervision provided for, but only the bald tax imposed, which therefore is clearly invalid.

Section 7 of Ordinance of 1883 (Record, page 30) provides:—

> "That on all conductors or wires suspended above ground * * * an annual payment of two dollars and fifty cents per mile, or any part thereof, in length of wires or conductors, for each and every wire or conductor used, or to be used, for telegraphic, telephonic, or other purposes."

This is as clearly a mere tax as was the ordinance of the Port of Mobile, "that the license tax for the year from the 15th of March, 1883, to the 15th of March, 1884, be and the same is hereby fixed as follows: On telegraph companies, $225," which this Court declared to be invalid.

That the City has no right to impose the tax in question as an inducement to the Telegraph Companies to place their wires underground, was conceded by the Circuit Court of Appeals in this case.

> "We are not prepared to say that the Court erred in refusing the plaintiff's second point. That proposition, it will be perceived, does not touch the right of the City, by direct legislation, to compel all private persons and corporations to place their wires underground, but asserts the right of the City to impose license charges in excess of all the expenses incurred by the municipality because of the presence of poles and overhead wires in the streets, although they are lawfully there."
>
> Philadelphia *vs.* Atlantic & P. Tel. Co., 102 Fed. Rep., 254-257.

> "The tax in question seems to me to indicate upon its face that it was not imposed *bona fide* for the privilege of using the streets, but was intended either as a tax upon the franchise of the Company, or for the purpose of driving its wires beneath the ground. While the latter object may be a perfectly legitimate one, I consider it a misuse of the taxing power to seek to accomplish it in this way. I am therefore, constrained to dissent from the opinion of the Court."
>
> Mr. Justice Brown dissenting: St. Louis *vs.* Western Union Tel. Co., 148 U. S., 92-107.

VII.

The case should have been submitted to the jury, and the judgment should be reversed, because it was not so

submitted. The Courts of Pennsylvania and the Circuit Court of Appeals for the Third Circuit all concur in stating that the license fee must be reasonable, and that to be reasonable it must be limited to the necessary expenses of issuing it and the additional labor of officers and other expenses thereby incurred, but seem to consider that the possible liability for an accident by reason of a defective regulation and inspection is ground for an addition, undefined in amount, to the expenses and additional labor mentioned, but whatever this may be, it is clearly a matter of fact to be determined by the jury under the instructions of the Court.

It is said that there is a presumption of propriety in the tax because there is generally a presumption that the public acts of public officers have been duly performed, and discretion committed to them duly exercised. Under the circumstances of this case this presumption is somewhat of an anomaly, but, passing that, all that such presumption can mean is that the ordinance is *prima facie* evidence that the regulation, and the license tax thereto appended, are reasonable; it certainly does not allow the municipal authorities to follow a mere "rule of thumb," but assumes that they have fairly ascertained, considered, and calculated what amount of extra expense has been incurred by the municipality because of the reasonable exercise of the power of regulation conferred upon it, and that the amount of the tax has been made to conform thereto.

That the exercise of this discretion is subject to the supervision of the courts is, however, conceded in all the cases cited or referred to, and it therefore follows that although it may not be necessary for the municipal legislature to set forth its reasons for fixing the police tax at the amount they do, yet, nevertheless, it is equally plain that the Courts must ascertain for themselves whether all the facts and circumstances justify the municipal conclusion; otherwise the judicial supervision would be obviously without meaning or efficiency.

To enable the Court to determine this the City put in evidence the ordinances themselves as *prima facie*

proof of the imposition and reasonableness of the tax. Thereupon the Telegraph Company offered evidence to show exactly what the regulation and supervision were that the City exercised over it, and the cost of the only Department through and by which it was exercised. The Company did not attempt to show what amount of supervision might, could, or should have been exercised over it, which, of course, would have been a mere matter of opinion, but, as stated, did show exactly what the City had actually done, to wit, as testified by Mr. Gill, nothing.

> "Q. During that time what regulation or supervision did the City of Philadelphia exercise over those poles and wires?
>
> "A. None. The supervision and regulation is looked after by the Telegraph Company itself." (Record, page 36.)

If this evidence was believed, then there was no right on the part of the City to impose the tax in question, because the expense of issuing the permit for the erection of the poles and wires had been covered by the fee of five dollars per pole charged therefor, and after that, according to the testimony, nothing whatever was done by the City in relation thereto.

If it be said that the rebutting evidence in the case tended to show that the City did incur some expense in the matter, then, without criticising the paucity and vagueness of it, there was an issue of fact raised as to which the testimony directly conflicted, and the jury became, of course, the proper tribunal to decide such issue.

The question is, What is a proper police tax as part of a police regulation? and that is, at most, the cost of issuing the license of making the inspection, and of enforcing the regulation, in view of all the facts and circumstances of the particular case. The municipal legislature is to determine this in the first instance, and having fixed a tax which it deems reasonable, but which is subject to be reviewed by the courts, then, when the reasonable-

ness of the tax does come to be determined by the courts, if the supervision of the courts means anything, it must mean that the court must itself ascertain and determine, in view of all the facts and circumstances, first, whether the police regulation is a reasonable one; and, second, what amount of police tax will recoup the municipality for the cost and expense thereof.

Therefore, when the Telegraph Company showed that the license to erect the poles and wires was already paid for, and that no supervision or regulation, certainly none which entailed any expense, was thereafter exercised or incurred by the City, the burden of proof was shifted to the City to contradict this evidence and show if it could what in fact it had done and what in fact had been the expense of doing it.

When, therefore, the City gave evidence tending to show that its linemen did observe the poles and wires of the Telegraph Companies while working upon the poles and wires of the City, and that it was their duty to make report of anything they saw amiss therein, while it may be that the jury may have inferred therefrom that some expense was in fact incurred by the City; yet, nevertheless, this presented a question of fact which, like all other questions of fact, should have been submitted to the jury for its determination.

This question was submitted to the jury on the trial of the case of the Borough of New Hope *vs.* Western Union Telegraph Company just decided, and it was decided by the Circuit Court of Appeals for the Third Circuit in the case of the City of Philadelphia *vs.* Western Union Telegraph Company, 89 Fed. Rep., 454, that it ought to have been so submitted. In point of fact, this question was submitted to the jury upon the first trial of this case, with the result that the jury, notwithstanding the prejudice against corporations, cut the City's claim in two. (102 Fed. Rep., 256.)

But it may be said that we have omitted to mention another item which should enter into the calculation, and that to "such a charge for the license as will cover the

necessary expenses of issuing it and the additional labor of officers and other expenses thereby incurred," there must be added another sum to cover the possible liability of the City in the event that "should a citizen be injured by reason of the neglect (by the City) of such duty, an action might lie against the City for the consequences of such neglect."

Without here repeating all that has been heretofore said against the right to impose upon Telegraph Companies this burden for which no precedent has been cited, and which seems not to be imposed upon any other object, and however vague and undefined it may be, it must be conceded that if the municipality has the right to consider it, it must measure it, and that the only measure to be applied to it is that of experience; it seems impossible to argue that a municipality can impose a burden on an instrument of interstate commerce, which must be borne and paid for by the general public of the whole country using that instrumentality, upon a mere guess as to what may happen in the future without regard to what has happened in the past.

Now, upon that point, that is to say, what liability might possibly be imposed upon the City by reason of the Company's poles and wires, there was no evidence that for a period of seven years continuously—a period equal to the presumption of life—any accident had happened for which even the Telegraph Company was liable, and *a fortiori* for which the City was liable, or had even been alleged to have been liable.

Even if provision for such possible liability of the City, contingent upon its own negligence, can be included in a police tax, it was a question for the jury to say what the amount of such provision should be in view of all the facts and circumstances of the particular case.

It is therefore respectfully insisted that the precedents cited should have been followed in this case, and that the judgment herein should be reversed because the issues of fact presented by the pleadings and testimony were not submitted to the jury for decision.

VIII.

That the plaintiff in error is engaged in interstate commerce and that the business it transacts is in itself commerce, and that by virtue of the Act of Congress of July 24th, 1866, and its acceptance thereof said telegraph company is entitled to all the privileges and immunities and is subject to all the restrictions which flow from the power given to Congress by the Constitution to regulate commerce, and the legislation in that behalf enacted by Congress, is distinctly decided in

Telegraph Co. *vs.* Telegraph Co., 96 U. S., 1;
Telegraph Co. *vs.* Texas, 105 U. S., 460;
Leloup *vs.* Port of Mobile, 127 U. S., 640;

cases which have been so often referred to and reasserted by this court as to need no further comment.

IX.

If therefore it has been shown, as it is believed it has been conclusively shown, that the charge in question has been imposed not only in form, but in reality, in, and as part of, a mere police regulation, and that the amount of the charge sued for in this case has been fixed without regard to the limits which the rules of law define for the right to impose charges under the police power (which otherwise are wholly indefinite), but exceeds those limits, then it follows that the plaintiff in error as an interstate commerce company, whose business is commerce itself, and in the nature of the postal service, has the right to invoke the protection of the Constitution of the United States against this attempt to burden and regulate interstate commerce.

The Constitution of the United States has committed to Congress the power to regulate commerce between the States, and the necessity for this delegation of power, the exclusiveness of the grant, and the vast extent of it, have often been the subject of judicial examination and luminous statement by this Court. Taxation is regulation, and therefore the power of Congress in the premises, broadly

stated, would seem to exclude the States from any power of regulation or of taxation of interestate commerce or its necessary agencies.

On the other hand, to say that the States have the power to make and enforce all regulations necessary for the preservation or benefit of the life, health, comfort, and convenience of their citizens, and to say that they have the unlimited power of taxation over the persons and property, real and personal, tangible and intangible, within their respective jurisdictions, is, after all, to say no more, than that the States did not surrender their sovereignty when they adopted the Federal Constitution; and that the preservation of the autonomy of the States is as necessary to our theory of government as is the due preservation and enforcement of all the powers committed to Congress.

It is to this Court that the power to reconcile these two apparently conflicting principles is committed, and that this is frequently difficult is shown by the great number of cases in which this Court has been invoked to decide whether or not particular regulations and taxes imposed by the States have been within their unsurrendered powers, or, on the other hand, have trenched upon the powers committed to Congress.

Referring to its many decisions upon the subject, and to the fact that so large a proportion of them have been accompanied by strong dissents, this Court has itself said, speaking through Mr. Justice Miller—

> "With reference to the utterances of this Court until within a very short time past, as to what constitutes commerce among the several States, and also as to what enactments by the State legislatures are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the Court who have written opinions for it may not have meant precisely the same thing."
>
> Fargo *vs.* Michigan, 121 U. S., at page 240.

In his opinion in the case of the Reading Railroad Company *vs.* Pennsylvania, commonly called the case of "State tax on Railway Gross Receipts" (15 Wall., at page 299), Mr. Justice Miller said:—

> "I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce."

And if we substitute "intelligence transmitted" for the words "goods transported," we have an authority directly upon the point in controversy in the case now before the Court.

While it may be true that the expression of Mr. Justice Miller, above quoted, was read by him in a dissenting opinion, it nevertheless became in fact the principle adopted by the Court in its unanimous opinion in the subsequent case of Philadelphia & Southern Steamship Co. *vs.* Pennsylvania, 122 U. S., 326.

As has already been noted, the charge sought to be recovered from the Telegraph Company in this case is not imposed under the taxing power, and therefore its decision does not involve the consideration of the extent of that power, nor will a decision against its validity in any wise derogate from limit or qualify the power of the State to tax all property within its jurisdiction, whether used in the transaction of interstate commerce or not.

On the contrary, as has already been shown, the charge sought to be recovered here is one imposed under the alleged inherent power of a municipal corporation to police its highways, and even admitting for the sake of argument that the municipality has power to impose the cost of regulation upon the thing regulated, it follows that such charge must be strictly limited within the bounds prescribed, or otherwise, citizens of other States will be made "to pay a tax, contribution, or toll for the privilege of having their intelligence communicated through" the City of Philadel-

phia "by the ordinary channel" of telegraphic communication, and their constitutional right to such transmission be "needlessly" burdened and regulated.

The current of authority in this Court that it will declare invalid and relieve against any charge which is in its nature or effect a burden upon, and therefore a regulation of, interstate commerce, unless such charge can be justified and sustained as a proper exercise of the taxing power, is so strong and so uniform that it is deemed unnecessary to cite more than a few of its many decisions upon this point.

Where a State statute imposed a license tax upon drummers and others, selling by sample within a certain taxing district, although it made no discrimination between those who represented business houses out of the State and those who represented like houses within the State, it was nevertheless held by this Court to be invalid, for the reason that it was a burden on, and, therefore, a regulation of interstate commerce, and as such unconstitutional.

It is distinctly stated by this court that interstate commerce cannot be taxed at all by the State, and that the fact that the tax is imposed by a law or an ordinance purporting to be an enforcement of the police power, or a privilege tax, can make no difference in the application of the rule.

Robbins *vs.* Shelby Taxing District, 120 U. S., 489.

And this has been since reaffirmed in—

Asher *vs.* Texas, 128 U. S., 129;
Stoutenburgh *vs.* Hennick, 129 U. S., 141;
McCall *vs.* California, 136 U. S., 104;
Brennan *vs.* Titusville, 153 U. S., 289.

An Act of the Legislature of the State of Kentucky, entitled an "Act to regulate agencies of foreign express companies" imposed upon such agents an annual tax of five dollars with certain small fees for the filing of certain papers relating to the business of the company and required to be filed in the office of the auditor of public accounts.

This Court held this tax to be a regulation of interstate commerce and therefore void. The Court said:—

> "But the main argument to support the decisions of the Court of Appeals is that the Act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem necessary for the good order of society and the well being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce.
>
> Crutcher *vs.* Kentucky, 141 U. S., 47-59.

Although the right of a State in the due exercise of its police power to regulate the inspection and sale of articles of food cannot be questioned, yet this court has always been careful to consider whether under the guise of inspection and of the exercise of the power of protection any burden has been laid upon interstate commerce, and if so, whatever the form of the imposition was, the regulation has been declared unconstitutional and void.

Where the State of Missouri passed a statute purporting to regulate the driving of cattle into its territory, this Court said:—

> "It (a State) may not under the cover of exercising its police power substantially prohibit or burden either foreign or interstate commerce. * * * The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. *And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion.*"
>
> Hannibal & St. J. R. R. Co. *vs.* Husen, 95 U. S., 465-472-473;

and the reasoning of this case has been since followed in—

Minnesota *vs.* Barber, 136 U. S., 313;
Brimmer *vs.* Rebman, 138 U. S., 78;
Cotting *vs.* Goddard, 183 U. S., 79;
St. Louis Coal Co. *vs.* Illinois, 185 U. S., 203.

Even where the regulation imposed was in relation to the selling of intoxicating liquors, which is peculiarly a matter of police cognizance, this court has held that the power must be so exercised as not to operate as a burden on or regulation of interstate commerce.

> "And while, by virtue of its jurisdiction over business and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons, and the protection of property so situated, yet the subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State unless placed there by congressional action."

Leisy *vs.* Hardin, 135 U. S., 100, 108;

and to same effect—

Lyng *vs.* Michigan, 135 U. S., 161.

The councils of Titusville, Pa., by an ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville, imposed a license fee of twenty-five dollars a year upon persons canvassing or soliciting within that city orders for goods, books, paintings, wares, or merchandise of any kind, and for a violation thereof imposed a fine not exceeding $100, for a breach of which ordinance one Brennan was convicted and fined twenty-five dollars by the city recorder. The defendant appealed to the Court of Common Pleas, which rendered judgment against him, and then appealed to the Supreme Court of the State,

which affirmed the judgment of the court below, and thereupon sued out a writ of error to this court.

The power of the city of Titusville to levy the license tax in question was clearly given by the Act of the Legislature of Pennsylvania of 22d May, 1874, section 20, clause 4 (P. L., 239), viz.:—

> "*To levy and collect license tax* on auctioneers, contractors, druggists, * * * *and regulate the same by ordinance.*"

This court said:—

> "The ordinance itself is entitled: 'An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville,' and the special section requires a license for transacting business, the license being graded in amount by the time for which it is obtained. This license, therefore, the failure to take out which is the offense complained of, and for which defendant was sentenced, is a license for 'general revenue purposes,' within the very declarations of the ordinance. *Even if those declarations had been the reverse, and the license in terms been declared to be enacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify or the power invoked to sustain the Act of the State, if that Act is one which trenches directly upon that which is within the exclusive jurisdiction of the National Government, it cannot be sustained.*"

Thus in New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650, 661, this court, by Mr. Justice Harlan, said:—

> "Definitions of the police power must, however, be taken subject to the condition that the State can-

not, in its exercise, for any purpose whatever, encroach upon the powers of the general government or rights granted or secured by the supreme law of the land." * * *

"Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an Act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of the long line of decisions, that it is well settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

* * * * * * *

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say it shall not be carried on in this way, and to that extent to regulate it.

Brennan *vs.* City of Titusville, 153 U. S., 289-299, 302-303.

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Without repeating the language of this court in others of these cases above cited the result of their reasoning may be summarized to be that the police power of a State and, *a fortiori*, of a municipality cannot obstruct interstate commerce beyond the necessity for its exercise. That the question of whether or not under the guise of the exercise of the police power a burden has been laid upon interstate commerce is always open in this court, and the law or ordinance in controversy will be carefully scrutinized to ascertain whether or not any such burden has in fact been imposed; that any charge upon the agent or agencies involved in the transaction of interstate commerce is a burden upon commerce itself, and cannot be imposed by a State, and, *a fortiori*, by a municipality, without the assent of Congress; and that the silence of Congress in this respect is equivalent to a declaration on its part that it should be absolutely free.

That a license tax, irrespective of whether the amount is much or little, where levied upon the occupation itself, or upon the means of carrying on the business, is, where the business carried on is interstate commerce, a direct burden upon interstate commerce, has been abundantly settled by the adjudications of this court.

Thus, where an importer was required to take out a license and pay a fee of fifty dollars therefor before he was permitted to sell a package of imported goods, it was said:—

> "All must perceive a tax upon the sale of an article imported only for sale is a tax on the article itself. * * * So a tax on the occupation of an importer is in like manner a tax on importation."
>
> Brown *vs.* Maryland, 12 Wheaton, 419-444.

> "Where the business or occupation consists in the sale of goods the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy,

> it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license. * * * The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States, or in this court, to control its action, however unreasonable or oppressive."
>
> Welton *vs.* Missouri, 91 U. S., 275-278-281.

Speaking of Welton *vs.* State of Missouri, 91 U. S., 275, Justice BREWER says:—

> "It is true that the case turned largely upon the fact of discrimination between products of other States and those of Missouri, but nevertheless the [illegible] is an adjudication that the imposition of a license tax on the peddling of goods is a regulation of commerce."
>
> 153 U. S., 304.

Under these cases, and especially under Leloup *vs.* Mobile (*infra*), which is directly in point, it is clear that the City of Philadelphia cannot impose a charge upon the Telegraph Company for the right to maintain its poles and wires therein any more than it can impose a license tax upon its occupation, or for the privilege of doing business within the limits of that city, or for the right to maintain an office therein.

Conceding the power of police regulation, and even that a tax may be imposed as part thereof, it would seem that there is a plain and important distinction and difference with reference to the subject upon which such tax can be imposed as part of said police power.

Thus, although the State of New York had authority

under the police power to require lists of immigrants to be furnished it, as decided by this Court in New York *vs.* Miln, 11 Pet., 103, yet it had no power to require a tax to be paid upon such passengers. (Passenger Cases, 7 Howard, 283.) And therefore under a statute which required a master to file such lists and comply with certain other conditions *or* pay the tax, it was held that the statute was void, although otherwise a proper exercise of the police power in respect to a matter in which the police power is specially applicable.

Henderson *vs.* Mayor, 92 U. S., 259.

So again, although cities may lawfully regulate or even prohibit traffic in or transportation of high explosives, such as nitro-glycerine, between persons within their territorial limits, yet, nevertheless, it would seem to be quite clear that it could not, under the guise of a police inspection, impose what was substantially a tax upon nitro-glycerine carried through its limits on the way, and as part of a continuous transportation, from one State to another.

And so in regard to spirituous liquors—although a State may prohibit the sale thereof, it is only after the same has become mixed with other property within its limits that such prohibition can take effect, and it is wholly without power to prohibit the transportation of liquors across its territory as part of a continuous transportation thereof from one State to another; nor could the same end be accomplished by prescribing an inspection accompanied by an inspection fee, which would practically be a tax upon the article transported.

So in reference to the matter in hand. A regulation of and incidental tax upon poles and wires for trolley lines or electric light lines, or even telephone lines are purely matters of local importance in respect to which the particular locality not only has, but ought to have, the right to prohibit and therefore a power of regulation, and any tax imposed as part of the regulation is a matter of purely

local consequence, because in the nature of things it must be paid out of the charges imposed for the use of the trolley line, or electric light line, or telephone line by the inhabitants of the locality imposing the tax—by the constituency of the body imposing the tax—and therefore in respect to such charges it may well be that the courts should hold that there is a presumption in favor of the regularity of the municipal action.

But not so in respect to telegraph poles and wires—a regulation and tax on them is not of local importance, but in its effect operates upon the whole line and upon all the business done thereon. In the present case the tax upon these poles and wires must be paid from the receipts derived from the transmission of messages in which the citizens of Philadelphia have personally little or no interest, for, of necessity, the proportion of messages sent to or from citizens of Philadelphia, is very small as compared with the proportion of messages sent from points north and east of Pennsylvania through Philadelphia to points south and west of Pennsylvania. The tax, therefore, is in its very nature not local, but national, and its propriety is not therefore to be judged from the local standpoint, as in the case of a tax on, *e. g.*, electric light poles and wires, which are matters of municipal concern only. It would therefore follow that even conceding the right of the City of Philadelphia to regulate and impose the cost of regulation upon the telegraph company, yet that it is peculiarly the province and the duty of this Court to see to it that the tax does not exceed the necessity for its imposition, and is not of such amount as to become a "needless" burden upon other communities, whose communication by electricity must pass through Philadelphia.

In the Mississippi Case the tax was only one dollar per mile of wire, which was "in lieu of other State, county, and municipal taxes" (Postal Tel. Co. *vs.* Adams, 155 U. S., 688), and it would seem that a charge which amounts to nearly four times that much, and levied as a charge for inspection alone, is manifestly exorbitant and

practically a tax, and therefore a regulation, of interstate commerce, for the transaction of which these poles and wires are necessary appliances.

It cannot be rightfully contended that in this case the Western Union Company is seeking to evade taxation. Taxation is governed by the value of the property taxed, and is uniform, bearing equally upon all property subject thereto; but in this case the charge confessedly has no relation to the value of the property or of the business done thereon, or of the earnings thereof, but is fixed at the discretion of the municipal legislature, without consideration of the rights of the general public or of the obligations of the company thereto.

The distinction sought to be made in this case is very clearly shown and seems to be sustained by the decisions of this court in respect to taxes on telegraph companies.

The property of a telegraph company is liable to taxation by a State on the same basis as all other property is so liable, a tax which the plaintiff in error has always paid to the State of Pennsylvania.

Western Union Tel. Co. *vs.* Massachusetts, 125 U. S., 530.

And even where the tax is imposed in form as a privilege tax, but is "in lieu of other State, county, and municipal taxes," and the amount of the tax is made dependent in fact upon the value of the property of the taxpayer situated within the jurisdiction of the State imposing the same it will, nevertheless, and notwithstanding its form, be held valid and sustained by this court.

Postal Tel. Co. *vs.* Adams, 155 U. S., 688.

And so a State may impose a specific tax on each telegraph message which the company sends over its line wholly within the State imposing such tax, but not upon messages sent by officers of the United States on public business, and not upon messages sent or received to or from points without the State. The power to tax such messages is confined to messages sent from one place to

another exclusively within the jurisdiction of the State imposing the tax.

Telegraph Co. *vs.* Texas, 105 U. S., 460.

And so a State may tax the gross receipts of a telegraph company derived from business transacted exclusively within the State.

Ratterman *vs.* Western Union Tel. Co., 127 U. S., 411;

Western Union Tel. Co. *vs.* Alabama, 132 U. S., 472.

Again, it has been held that a license tax imposed by a municipality duly authorized thereto by the State upon, *inter alia*, "telegraph companies or its agencies, each, for business done exclusively within the city of Charleston and not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents, $500," was valid.

Postal Tel. Co. *vs.* Charleston, 153 U. S., 692.

But there is nothing in any of these cases which holds or intimates, and, on the contrary, the reasoning of the court in all of them is wholly inconsistent with the right of a State, or of a municipality under the law of a State, to require a telegraph company to take out a license for the transaction of its business, or to impose upon it a tax for such license.

The Port of Mobile, a municipal corporation of the State of Alabama, enacted an ordinance:—

> "That the license tax for the year, from the 15th of March, 1883, to the 15th of March, 1884, be and the same is hereby fixed as follows: On telegraph companies, $225."

[It would have been no different, we submit, if the amount had been fixed by a tax or charge or imposition of so many dollars on each pole or each mile of wire.]

The action was for a penalty of five dollars, brought by the Port of Mobile against Leloup, who pleaded that he was the agent of the Western Union Telegraph Company at that place; that said company was engaged in the business of interstate commerce, and that he was in no other way engaged in the telegraph business. The Port demurred, and the local court gave judgment for the plaintiff, which was affirmed by the Supreme Court of the State, which said:—

> "That no revenue for State or municipal purposes can be derived from the agencies or instrumentalities of commerce no one will contend. The question generally mooted is, How shall this end be attained? In the light of the many adjudications on the subject the ablest jurists will admit that the line which separates the power from its abuse is sometimes very difficult to trace. No possible good could come of any attempt to collect, explain, and harmonize them. We will not attempt it. We confess ourselves unable to see a distinction between this case and the principle involved in Osborne *vs.* Mobile, 16 Wall., 479. In that case the license levied was upheld, and we think it should be in this case."

This court said of the ordinance sustained in Osborne *vs.* Mobile:—

> "This court said that the ordinance was not unconstitutional. This was in December Term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States."

And in holding the ordinance invalid this court further said:—

"Can a State prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. Ordinary occupations are taxed in various ways, and in most cases legitimately taxed, but we fail to see how the State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation—a tax on the occupation of doing a business is surely a tax on the business. Now we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different States, it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and free from the control of State regulations except such as are strictly of a police character. * * *

"In our opinion, such construction of the Constitution leads to the conclusion that no State has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such tax is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary."

Leloup *vs.* Port of Mobile, 127 U. S., 640-645-648.

The poles and wires taxed in this case were used, according to the testimony, "for the general business of the entire country, messages from all parts of the South, the North, the East, and West all going to Washington or New York and New Orleans, or cablegrams or Govern-

ment messages." (Record, page 36.) The plaintiff in error respectfully insists that a tax, whether imposed under the guise of a police regulation or not, imposed upon these necessary instruments for carrying on the business of interstate commerce, in the nature of postal service, is as much prohibited as a license tax upon the occupation of doing such business or upon the office or agencies for transacting the same, and should have been held unconstitutional and void by the court below.

The lines of the plaintiff in error extend into all the cities and towns of the United States and into almost all the boroughs and villages—they have been extended into any place, however small, where population has been concentrated, and the poles and wires are the necessary means for the communication of intelligence by electricity between these different points.

If the municipalities of Pennsylvania can, under their general police power, impose police taxes upon these poles and wires, notwithstanding the powers conferred by the Act of Congress, then each and every of the municipalities throughout the United States—each and every of the cities, towns, villages, boroughs, and townships throughout the whole country—may do the same.

The most general rate imposed by the municipalities of Pennsylvania, as shown by the reported cases, is one dollar per pole per annum, and two dollars and fifty cents per mile of wire per annum, which, varying with the number of wires on the pole, amounts to a tax of from $50 to $100 a year per mile of line, an amount which far exceeds in proportion to the value of the property any tax, usually so called, imposed anywhere in that State upon any kind of property whatsoever; and such a rate extended throughout the United States—and there is no possible legal reason why it should not be so extended if it is valid in the State of Pennsylvania—would, it is plain to be seen, be ruinous to telegraph companies.

A tax which confessedly is not a tax on property, or on an occupation or business, or on the receipts derived therefrom, and which is therefore subject to no rule, but is

fixed at the discretion of a municipality as tempered by that of a jury, *and which yet confessedly exceeds in amount any possible rate of legitimate taxation*, and in point of fact all other legitimate taxation combined, would seem to be so far across "the line which separates the power from its abuse" as to be in this case easy "to trace."

Telegraph companies in Pennsylvania pay not only a tax upon their capital stock, which represents the value of their property—their franchises as well as their tangible property—but they also pay another tax upon their gross receipts, which represents the earning power of that property—thus, in fact, they pay a double tax, first, upon the value of the property; and, secondly, upon the value of its use—and yet in this case a city is permitted to impose yet another tax equivalent to a tax of ninety-nine dollars and fifty cents per mile of poles and wires in Philadelphia, an amount which is plainly a very large proportion of the whole value thereof, and very much in excess of any tax which could be imposed under the taxing power.

Against these charges telegraph companies have no protection except that afforded by the prohibition implied in the commerce clause of the Constitution of the United States, a protection which can only be made effective by the action of this Court, and to extend which was one of the reasons for its creation. The plaintiff in error now confidently seeks in this case to have extended to it by this Court the protection thus conferred by that Constitution.

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No. 163.—OCTOBER TERM, 1902.

Office Supreme Court U.
FILED
MAR 2 1903
JAMES H. MCKENNEY,
Clerk

Supreme Court of the United States.

THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY,
Plaintiff in Error,

against

THE CITY OF PHILADELPHIA,
Defendant in Error.

APPENDIX

TO

BRIEF OF PLAINTIFF IN ERROR, CONTAINING FEDERAL AND STATE LEGISLATION.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

ACTS OF CONGRESS.

United States Telegraph Act of July 24, 1866.

(Stats. at Large, Vol. 14, p. 221).

" AN ACT to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, being *Title LXV.* of the U. S. Rev. Stat (p. 1019).

" Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Sec. 1. That any telegraph company now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States, provided that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters or interfere with the ordinary travel of such military or post-roads.

And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses, in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its lines of telegraph may be located, as may be

necessary for its stations, not exceeding 40 acres for each station; but such stations shall not be within 15 miles of each other.

"SEC. 2. And be it further enacted that telegraphic communications between the several departments of the Government of the United States and their officers and agents, shall, in their transmission over the lines of any of said companies, have priority over all other business and shall be sent at rates to be annually fixed by the Postmaster-General.

"SEC. 3. And be it further enacted that the rights and privileges hereby granted shall not be transferred by any company acting under this Act, to any other corporation, association or person; provided, however, that the United States may at any time after the expiration of five years from the date of the passage of this Act for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies, at an appraised value to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"SEC. 4. And it be further enacted that before any telegraph company shall exercise any of the powers or privileges conferred by this Act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this Act."

Act of Congress of June 10, 1872, enforcing Act of July 24, 1866. Vol. 17, Stats. at Large, p. 366.

"Provided that the Secretary of War be and he hereby is authorized and required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports and signals as may be found necessary for the benefit of agricultural and commercial interests; and provided that no part of this appropriation nor of any appropriation for the several departments of the Government shall be paid to any telegraph company which shall neglect or refuse to transmit telegraphic communications between said departments, their officers, agents or employees, under the provisions of

the second section of chapter 230 of the statute of the United States for the year 1866, and at rates of compensation therefor to be established by the Postmaster-General: provided also that, whenever any telegraph company shall have filed its written acceptance with the Postmaster-General of the restrictions and obligations required by the Act approved July 24, 1866, entitled 'An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes,' if such company, its agents or employees shall hereafter refuse or neglect to transmit any such telegraphic communications as are provided for the aforesaid Act or by the joint resolution approved the 9th day of February, 1870, 'to authorize the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent and for giving notice on the northern lakes and seaboard of the approach and force of storms,' such telegraph company shall forfeit and pay to the United States not less than one hundred and not exceeding one thousand dollars for each refusal or neglect aforesaid, to be recovered by an action or actions at law in any District Court of the United States."

Acts of Congress Concerning Post Roads.

AN ACT, approved June 8th, 1872, being in Chapter Nine, United States Revised Statutes (p. 768). (Vol 17 Stats at Large p 308, 309.)

SEC. 3964 Rev Stats. The following are established post-roads:

* * * * * *

All railroads or parts of railroads which are now or hereafter may be in operation.

* * * * * *

All letter-carrier routes established in any city or town for the collection and delivery of mail matters.

CHAP. 9. AN ACT making all public roads and highways post-routes.
(Vol 23 Stats at Large p 3.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

That all public roads and highways while kept up and maintained as such are hereby declared to be post-routes.

Approved, March 1st, 1884.

CONSTITUTION AND LAWS OF PENNSYLVANIA.

Constitutional Provision.

The **Constitution of Pennsylvania**, article XVI., section 12, provides:—

"Any association or corporation, organized for the purpose, or any individual, **shall have the right to construct and maintain lines of telegraph within this State**, and to connect the same with other lines, and the General Assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section."

Legislative Act of 1874.

Pursuant to this mandate the Legislature of Pennsylvania, by **Act of 29th April, 1874**, section 33, P. L., 92, provided for the incorporation of telegraph companies, and that when incorporated they should be authorized—

"To construct lines of telegraph along and upon any of the public roads, streets, lands, or highways, or across any of the waters within the limits of this State, by **the erection of the necessary fixtures**,

including posts, piers, or abutments, for sustaining the cords or wires of such lines; but the same shall not be so constructed as to incommode the public use of **said roads, streets, or highways, or injuriously interrupt the navigation of said waters."**

Legislative Act, May 1, 1876.

Before the exercise of any of the powers given under this act, application shall be first made to the municipal authorities of the city, town, or borough in which it is proposed to exercise said powers, for permission to erect poles or run wires on the same, or over or under any of the streets, lanes or alleys of said city, town or borough, which permission shall be given by ordinance only, and may impose such conditions and regulations as the municipal authorities deem necessary: *Provided*, That cities of the first class shall be exempted from the provisions of this act. This Act of 1876 was amended by the Act of June 25th 1885, P. L. 164, and this latter Act re-enacted the above cited section except the proviso.

Memorandum.

There is no legislative authority in express terms in Pennsylvania conferring upon the City of Philadelphia or any borough or municipality in the State the power either *(a)* to *tax* telegraph companies, or *(b)* to require telegraph companies to take out a *license* from any municipal authority, or *(c)* subjecting telegraph companies to the *police power* of the municipal authorities. As to the mode of taxation of corporations in Pennsylvania, including telegraph companies, see BRIEF of Telegraph Company in Case 163 pp 23, 68. The telegraph company has paid all taxes assessed upon its property (Record in Case 163 p 15).

FURTHER MEMORANDUM:

The Federal and State legislation contained in this APPENDIX is equally applicable to the petition for a rehearing in case No. 101, Western Union Telegraph Company v. Borough of New Hope, and may be considered as filed also in connection with said petition for re-hearing.

Inasmuch as the questions raised in these cases, Nos. 101 and 163, involve, inter alia, the construction of the commerce-clause of the Constitution and its application in a new and important aspect, and as neither of these cases has ever been heard before a full bench, we venture respectfully to suggest that, in accordance with a salutary practice of this Court to have such questions passed upon by a full bench, both of these cases could, with propriety, be set down for full re-argument upon the important questions involved before all the justices.

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